LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 16 1959
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1959

No. 3

ELLEN GOETT, as Administratrix of the Estate of MARVIN PAUL GOETT, deceased.

Petitioner,

v.

UNION CARBIDE CORPORATION and AMHERST BARGE COMPANY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT, AMHERST BARGE COMPANY

HOMER A. HOLT,
WILLIAM T. O'FARRELL,
DAVID D. JOHNSON,
Counsel for Respondent,
Amherst Barge Company,
JACKSON, KELLY, HOLT & O'FARRELL
Of Counsel
1601 Kanawha Valley Bldg.
Charleston, W. Va.

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

SUBJECT INDEX

		Page
I.	Opinions Delivered in the Courts Below	1
II.	Statutes Involved	2
III.	Questions Presented	2
IV.	Statement of the Case	3
V.	Summary of Argument	10
VI.	Argument	14
1.	The Maritime Law Does Not Allow Recovery For Wrongful Death, Independently Of A Federal Or State Statute Creating Such Right Of Action	14
2.	Where Admiralty Adopts A State Wrongful Death Statute As A Rule Of Right To Be Administered Within Its Own Jurisdiction, It Must Take The Right Subject To The Limitations Which Have Been Made A Part Of Its Existence	16
3.	The West Virginia Wrongful Death Act Does Not Permit Recovery Based On Unseaworthiness	18
4.	Goett Was Not A Person To Whom The Warranty Of Seaworthiness Ran	19
5.	The Barge Was Not Unseaworthy	22
6.	Carbide Was Not Guilty Of Negligence	23
7.	If Carbide Was Negligent, Recovery Is Barred By Goett's Assumption Of Risk And Contributory Negligence	24
8.	If Carbide Is Liable, It Is Not Entitled To Indemnity From Amherst	31
VII.	Conclusion	44

TABLE OF CASES

—A—

	Page
Alaska S. S. Co. vs. *Patterson*, 347 U. S. 396	21
Alloy vs. *Hennis Freight Lines*, 139 W. Va. 480, 80 S. E. 2d 514	17
American Mut. Liab. Ins. Co. vs. *Matthews*, 182 F. 2d 322	36, 43
Amerocean S. S. Co. vs. *Copp*, 245 F. 2d 291	42

—B—

Barr vs. *Curry*, 137 W. Va. 364, 71 S. E. 2d 313	24
Berge vs. *Nat. Bulk Carriers*, 251 F. 2d 717	22
Berryhill vs. *Pacific*, 238 F. 2d 385	22
Blackley vs. *Powell*, 68 F. 2d 457	26
Boudoin vs. *Lykes Bros. S. S. Co.*, 348 U. S. 336	22
Brown vs. *American-Hawaiian S. S. Co.*, 211 F. 2d 347	31
Buckeye Cotton Oil Co. vs. *Ry. Co.*, 24 F. 2d 347	36
Butler vs. *Boston & Savannah S. S. Co.*, 130 U. S. 527	14, 15

—C—

Childress vs. *Ry. Co.*, 111 W. Va. 92, 160 S. E. 564	26
Continental Cas. Co. vs. *The Benny Skou*, 200 F. 2d 246	16
Curtis vs. *A. Garcia y Cia*, 241 F. 2d 30	17, 25
Craft vs. *Fordson Coal Co.*, 114 W. Va. 295, 171 S. E. 886	28

—D—

Delaware L. & W. R. Co. vs. *Koske*, 297 U. S. 7 26

Deslions (La Bourgogne) vs. *La Compagnie Generale Transatlantique*, 210 U. S. 95 14

Dunsmore vs. *Hartman*, 140 W. Va. 357, 84 S. E. 2d 137 17

—F—

Farley vs. *Ry. Co.*, 67 W. Va. 350, 67 S. E. 1116 27

—G—

Garrett vs. *Moore-McCormack*, 317 U. S. 239 16, 18, 23, 25

Gilkerson vs. *B. & O. Ry. Co.*, 129 W. Va. 649, 41 S. E. 2d 188 19

Graham vs. *A. Lusi, Ltd.*, 206 F. 2d 223 19, 25

Gray vs. *Boston Gaslight Co.* (Mass.), 19 Am. Rep. 324 43

—H—

Hagans vs. *Farrell Lines*, 237 F. 2d 477 42

Halcyon Lines vs. *Haenn*, 342 U. S. 282 31

Halliburton Oil Well Cem. Co. vs. *Paulk*, 180 F. 2d 79 36

Harrisburg, The, 119 U. S. 199 14, 15, 17, 30

Hartford Acc. & Ind. Co. vs. *Gulf*, 230 F. 2d 346 25

Hawn vs. *Pope & Talbot*, 198 F. 2d 800 42

Holley vs. *The Manfred Stansfield*, 269 F. 2d 317 29, 30, 31

Hunn vs. *Windsor Hotel*, 119 W. Va. 215, 193 S. E. 57 25, 28

—J—

	Page
Jacobs vs. *Southern Ry. Co.*, 241 U. S. 229	26
Jones vs. *Railway Co.*, 74 W. Va. 666, 83 S. E. 54	28
Jones vs. *Rinehart & Dennis Co.*, 113 W. Va. 414, 168 S. E. 482	19
Just vs. *Chambers*, 312 U. S. 383	14

—K—

Kernan vs. *American Dredging Co.*, 355 U. S. 786	14

—L—

Lambert vs. *Ensign Mfg. Co.*, 42 W. Va. 813, 26 S. E. 431	17
Lauritzen vs. *Larsen*, 345 U. S. 571	15
Laverty vs. *Hambrick*, 61 W. Va. 687, 57 S. E. 240	27
Lee vs. *Pure Oil Co.*, 218 F. 2d 711	19
Levinson vs. *Deupree*, 345 U. S. 648	14, 16, 17
Lindgren vs. *U. S.*, 281 U. S. 38	14
Lo Bue vs. *U. S.*, 188 F. 2d 800	42
Lynch vs. *U. S.*, 163 F. 2d 97	24

—M—

Mostyn vs. *Ry. Co.*, 160 F. 2d 15	36

—Mc—

McAllister vs. *U. S.*, 348 U. S. 19	31
McKelvey vs. *C. & O. Ry. Co.*, 35 W. Va. 500, 65 S. E. 334	25

—N—

Page

Niepert vs. *Cleveland Elec. Ill. Co.*, 241 F. 2d 916 ..... 17, 25

—O—

Oliver vs. *Ohio River R. Co.*, 42 W. Va. 703, 26 S. E. 444 .....

Osborne vs. *C. &P. Telephone Co.*, 121 W. Va. 357, 3 S. E. 2d 527 19

—P—

Pilot's Assn. vs. *Halecki*, 358 U. S. 613 ..... 20, 21

Pope & Talbot vs. *Hawn*, 346 U. S. 406 ..... 21, 42

Porello vs. *U. S.*, 153 F. 2d 605 36

Purkey vs. *Southern Coal Co.*, 57 W. Va. 595, 50 S. E. 755 26

Price vs. *Stonega Coke & Coal Co.*, 26 F. Supp. 172, 106 F. 2d 411 34

Priddy vs. *Coal Co.*, 64 W. Va. 242, 61 S. E. 163 28

Pritchard vs. *City Lines of W. Va.*, 136 W. Va. 278, 66 S. E. 2d 276 27

—Q—

Quinette vs. *Bisso*, 136 Fed. 825 ..... 17, 25

—R—

Raidy vs. *U. S.*, 252 F. 2d 117 22

Rich vs. *U. S.*, 177 F. 2d 688 43

Robinson vs. *Coal Co.*, 78 W. Va. 94, 88 S. E. 620 28

Rogers vs. *U. S. Lines*, 347 U. S. 984 22

Ryan vs. *Pan Atlantic S. S. Co.*, 350 U. S. 124 ..... 39, 41

—S—

	Page
Seaboard Ry. vs. *Horton*, 233 U. S. 492	26
Seas Shipping Co. vs. *Sieracki*, 328 U. S. 85	21
Sesler vs. *Rolfe Coal & Coke Co.*, 51 W. Va. 318, 41 S. E. 2d 216	24
Standard Oil vs. *Robbins Dry Dock*, 32 F. 2d 182	43
State ex rel Cashman vs. *Simms*, 130 W. Va. 430, 43 S. E. 2d 805	27
State ex rel Yost vs. *Scouszzio*, 126 W. Va. 135, 27 S. E. 2d 451	19

—T—

Torres vs. *The Kastor*, 227 F. 2d 664	42
Tungus, The vs. *Skovgaard*, 358 U. S. 588	14, 15, 17, 18, 19, 22, 23, 25, 30

—U—

Union Stockyards vs. *Ry. Co.*, 196 U. S. 217	43
United States vs. *Harrison*, 245 F. 2d 911	38
United States vs. *Porello*, 330 U. S. 446	37
Uthermohlen vs. *Bogg's Run Co.*, 50 W. Va. 457, 46 S. E. 410	23

—W—

Washington & Berkeley Bridge Co. vs. *Pennsylvania Steel Co.*, 215 F. 2d 32	34
Washington Gaslight Co. vs. *District of Columbia*, 161 U. S. 316	43
Weldon vs. *U. S.*, 65 F. 2d 748	35

Page

West vs. *U. S.*, 256 F. 2d 671 22

Western Fuel Co. vs. *Garcia*, 257 U. S. 233 14, 16, 18, 30

Weyerhaeuser S. S. Co. vs. *Nacirema Operating Co.*, 355 U. S. 563 40, 41

Williams vs. *Coal & Coke Co.*, 55 W. Va. 84, 46 S. E. 802 27

Woodell vs. *W. Va. Imp. Co.*, 38 W. Va. 23, 17 S. E. 386 27

STATUTES CITED

West Virginia Wrongful Death Act (Ch. 55, Art. 7, Secs. 5, 6 and 8, West Virginia Code of 1955. Michie's, Secs. 5474, 5475, 5477.) 2, 17

Longshoremen's & Harbor Worker's Compensation Act (33 U.S.C.A. 901-950.) 4, 5

Death On The High Seas Act (46 U.S.C.A. 761.) 15

Jones Act (46 U.S.C.A. 688.) 15

Supreme Court of the United States

OCTOBER TERM, 1959

No. 3

ELLEN GOETT, as Administratrix of the Estate of MARVIN PAUL GOETT, deceased.

Petitioner,

v.

UNION CARBIDE CORPORATION and AMHERST BARGE COMPANY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR RESPONDENT, AMHERST BARGE COMPANY

I.

Opinions Delivered In The Courts Below

The initial findings of facts and conclusions of law of the District Court are found at pp. 194 to 197 of the printed record. Further findings of fact and conclusions of law of the District Court, with respect to the third party complaint of Union Carbide Corporation against Amherst Barge Company, are found at pp. 236-237 of the printed record.

The opinion of the United States Court of Appeals for the Fourth Circuit is reported in 256 F. 2d 449, and is also to be found at pp. 241-250 of the printed record.

II.

Statutes Involved

This action is based upon the West Virginia Wrongful Death Act, Chapter 55, Article 7, Sections 5, 6 and 8, of the West Virginia Code of 1955 (Michie's, Sec. 5474, 5475 and 5477). These statutory provisions are quoted in footnote "2" of the Court of Appeal's opinion (R. pp. 244-245).

III.

Questions Presented

The following questions arise upon the petition for certiorari in this case:

1. Does the maritime law allow recovery for the allegedly wrongful death of Petitioner's decedent, independently of the Wrongful Death Act of West Virginia?
2. When admiralty adopts a state wrongful death statute as a rule of right to be administered within its own jurisdiction, must it take the right subject to the limitations which have been made a part of its existence?
3. Does the Wrongful Death Act of West Virginia provide a remedy for unseaworthiness of a vessel; and, if so, was Petitioner's decedent within the application of the doctrine of recovery for unseaworthiness?
4. Was the barge unseaworthy?

5. Was the respondent, Union Carbide Corporation guilty of negligence?

6. If the respondent, Union Carbide Corporation, was guilty of negligence, is recovery barred by Goett's assumption of risk, and/or contributory negligence?

7. If the respondent, Union Carbide Corporation, is liable for Goett's death, is it entitled to indemnity from Amherst?

IV.

Statement of the Case

This action was brought by the administratrix of Marvin Paul Goett, against Union Carbide Corporation, to recover damages for Goett's allegedly wrongful death by drowning as a result of having fallen overboard from a barge owned by Carbide, on October 5, 1955. At the time of Goett's fatal accident he was employed by Amherst Barge Company and was engaged in the repair of the barge pursuant to a contract between Amherst and Carbide.

The complaint (R. p. 1) alleges that Carbide "owned, operated, managed and controlled" the barge "204", and was under a duty to keep and maintain the barge and its appurtenances in a safe and seaworthy condition; that Goett was employed aboard the barge as a "harbor worker" and "sandblaster", and as such had the status of a "seaman"; that while so employed he was caused to fall overboard from the barge and suffered drowning as a result of Carbide's alleged negligence in failing to keep and maintain the barge and its appurtenances in a seaworthy condition, failing to take "any means of precautions" for Goett's safety, failing to provide Goett with a safe place to work, and by failing to provide "life pre-

servers, life lines, safety nets and proper, adequate and sufficient safety men and other tools and equipment and other means of rescue" to safeguard Goett; that Goett was without any "contributory negligence" on his part; and that he left surviving him heirs and dependents upon whose behalf the action was brought.

Carbide thereupon filed its answer, (R. p. 9) denying essential allegations of the complaint and asserting twelve particular defenses thereto; and also filed a third party complaint against Amherst (R. p. 5). In its third party complaint Carbide alleged that its barge was, at the time of the accident, "in the exclusive care, custody, possession and control" of Amherst for purposes of repair, and that "the primary liability for any loss, damages or claims" on account of the accident would, "as a matter of law, be imposed upon said third party defendant because in absence of express contract a vessel owner is entitled to indemnity for amount recovered by contractor's employee, if negligence of contractor, having exclusive custody of vessel, is the sole, active or primary cause of accident in which contractor's employee is injured."

The third party complaint further alleged that by virtue of the express provisions of the contract between Carbide and Amherst, for the repair of the barge, Amherst is liable to Carbide for "all loss or damage which might have been incurred or occasioned by its care, custody and repair while said barge was in its exclusive care, custody and control."

Amherst, in its answer to the third party complaint (R. p. 7), denied that it was negligent; averred that if Goett's death resulted from negligence, such negligence was his own, or that of Carbide, or both; averred that it had complied with the provisions of the Longshore-

men's and Harbor Worker's Compensation Act (33 U.S.C.A. 901-950), and subscribed to the Compensation provided for therein; that Goett's dependents are entitled to compensation under that Act; and that such Act constitutes its exclusive liability on account of the accident. Amherst further denied any duty or obligation to indemnify Carbide against any claims, judgments or losses arising from the accident, and denied all liability and responsibility therefore, other than that imposed by the Longshoremen's and Harbor Worker's Compensation Act.

Amherst subsequently filed an amended and supplemental answer, more particularly alleging contributory negligence and assumption of risk upon the part of Goett, and Carbide filed a like amendment, pleading assumption of risk as a bar to the action. (R. pp. 21-22).

Over the objections of the respondents, the trial court transferred the action to the admiralty side of the Court, and trial was had thereon before the District Judge. The evidence adduced at the trial shows that Carbide contracted with Amherst for certain repairs and improvements to the former's chemical tank barge "CC-204" (R. 207-208), including sand blasting, painting, and certain other repairs, and also for the installation of "Butterworth hatches" (R. p. 214); all in accordance with Carbide's written specifications. In contemplation of such repairs, the barge was delivered to Amherst's dock at Reed, West Virginia, on October 1st, 1955 (R. pp. 137-138). The work contracted for, contemplated and required that the barge be hauled out of the river and placed high and dry on Amherst's "marine ways" (R. pp. 65-71), but, at the time of Goett's drowning, on October 5, 1955, the barge was still afloat on the Kanawha River, lying along shore just downstream from

Amherst's marine ways and boat anchorage, and was moored to and against the head of a so-called "digger boat" lying just downstream from the barge (R. pp. 34-35). The "digger boat" was attached to the shore by a semi-permanent ramp which also was the means of access to the barge from the shore (R. pp. 86-89, 98). The barge was made of steel, with the top consisting of a flat deck with a six inch "crown" (R. pp. 35-36). The height of the deck above the water was about nine feet (R. p. 35). Except for a pipe line running lengthwise in the center of the barge, it had no super-structure of any kind (R. p. 43). However, there were a series of "kevels" along the outer edge of the deck to assist in mooring (R. p. 43).

The barge had no railing around its deck, and it was not equipped with any life rings or buoys or similar equipment (R. p. 138). In these respects, Amherst made no alterations or removals from the barge as it was delivered by Carbide (R. pp. 138-139). It is not customary for such barges to be furnished or equipped with railings, life rings, buoys or similar equipment (R. pp. 124, 132, 138-139). The barge and its equipment had been inspected, certified and approved by the Coast Guard, and a certificate of inspection issued on April 1, 1955 (R. p. 217). Applicable Coast Guard regulations do not require that such barges be equipped with railings or life buoys (R. pp. 135-137). There was a ring type life buoy and attached line mounted on the "digger boat" at the downstream end of the barge (R. pp. 40, 44-45).

Goett began work on the CC-204 on October 4, 1955, and had worked on the barge for one full shift, and half of another when he fell overboard (R. pp. 50-51, 145-146). He was not wearing a life jacket (R. p. 40), although life jackets were readily available to any em-

ployee who desired to wear one while at work. (R. pp. 49, 140-141).

Goett was wearing a canvas hood over his head and shoulders to protect against flying sand from the sandblaster. (R. p. 48), and was also wearing a respirator (R. pp. 48-49). The sand blasting equipment used by Goett consisted of a heavy machine sitting on the deck of the barge, but movable from place to place, with two hoses and attached nozzles leading therefrom. Goett was holding one of the hoses and nozzles in his hands and was directing the sand blast against the surface of the deck while he walked slowly across it. When last seen on the barge, Goett was at a point very near to one of the kevels at the outboard edge of the barge (R. p. 59, See circle marked on photograph, R. p. 199). At that moment he was walking slowly backward toward a kevel at the outboard edge of the barge, and was facing inboard, toward the shore, with his back toward the river (R. p. 62). Within approximately one minute after being seen in that position, he was discovered in the river, just outboard of the position in which he was last seen on the barge (R. p. 37-38).

Goett's fellow workmen on the barge heard the noise of the sandblaster nozzle thrashing against the deck, and ran to the edge of the barge and looked over (R. p. 38). Goett was seen in the water, and men immediately went into the river after him (R. pp. 38, 46-47), but he fought these men off and prevented them from keeping a grip on him (R. pp. 46-47). He then slipped beneath the surface and was drowned. Amherst's maintenance superintendent, Martin, arrived on the barge at about the time Goett went under. He threw the ring type life buoy off the digger boat into the water, but Goett was already sinking at that moment. (R. pp. 47- 48, 143-144).

Goett's death is within the coverage of the Longshoremen's and Harbor Worker's Compensation Act; and Amherst, through its insurance carrier, stands ready to pay the benefits provided by that Act; but as of the time of the trial, no application for such benefits had been made by or on behalf of Goett's dependents (R. pp. 29-30, 31-33, 79).

The District Court found as facts (R. pp. 194-197): that Carbide should have foreseen that many of Amherst's employees would work on the barge; that under these circumstances it was negligence for Carbide not to equip the barge with safety and rescue equipment; that the barge was not seaworthy at the time Goett was drowned, for all the circumstances in which it was being used; that failure to provide rescue equipment was the proximate cause of Goett's death; and that Amherst had exclusive custody, care and control of the barge at the time Goett fell therefrom.

The District judge concluded: "this case is not one for the applicability of the doctrine of liability without fault. I think this is a negligence case and that negligence has been shown * * * "; that it was the duty of Carbide to furnish workmen who worked on the barge a safe place to work, and to that end to provide safety equipment, such as life lines or stanchions, to prevent their falling off the unprotected deck; that it was also the duty of Carbide to provide reasonably suitable rescue equipment, and to place such equipment in a position on the barge where it would be immediately available in case of need; that Goett was not guilty of any negligence contributing to his death; that Goett did not assume the risk of the failure of Carbide to have rescue equipment available; that plaintiff is entitled to recover $20,000.00, against Carbide, but that if the limitations in the West Virginia

Wrongful Death Act did not apply, plaintiff would have been entitled to recover $50,000.00, and that Carbide is not entitled to indemnity from Amherst.

Judgment having been entered in the District Court in favor of the plaintiff and against Carbide for $20,000.00, both the plaintiff and Carbide appealed. Amherst did not appeal, but filed an assignment of cross-error to the trial courts findings that Goett did not assume the risk that caused his death, and that he was not guilty of contributory negligence.

The Circuit Court of Appeals for the Fourth Circuit reversed, holding that: the maritime law does not allow recovery for wrongful death; that where death upon inland waters results from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given; that the West Virginia Wrongful Death Act, like other statutes patterned on Lord Campbell's Act, has created a new cause of action for the benefit of certain named beneficiaries, and has not perpetuated the cause of action which the deceased had before his death; that the right to maintain such a suit can be enforced in admiralty only in accordance with the substantive law of the state whose statute is being adopted; that any limitations in the state statute as to the amount and character of damages which may be allowed, are binding on the admiralty court; that it is unnecessary to decide whether a suit under the West Virginia Wrongful Death Act can be based on unseaworthiness, because Goett "was not a person to whom the warranty of seaworthiness ran", and "because we do not agree with the finding of the District judge that the barge was unseaworthy"; that

Carbide was not negligent in "delivering the barge to Amherst without mounting life rings or other safety equipment on the barge, or in failing to rescue Goett after he fell into the river, as contended by his administratrix"; that "Carbide breached no duty that it owed to Goett"; and that judgment therefore should have been entered in favor of the defendant.

The Court of Appeals expressly stated that its decision, summarized above, "makes it unnecessary to pass on the other questions raised by the several parties." Accordingly, the Court's opinion does not purport to deal with the questions of Goett's assumption of risk or contributory negligence, or with the question of Carbide's claim for indemnity from Amherst, and those questions are not set forth in the petition for certiorari in this Court.

V.

Summary of Argument

1. The maritime law does not provide a remedy for wrongful death. Thus, no action can be maintained in the Courts of the United States to recover damages for wrongful death on the high seas, or on inland navigable waters, in the absence of an act of Congress, or a statute of a state, giving a right of action therefor. There is no act of Congress giving such a right with respect to Goett's death in this case. Therefore, the only right of action in this case is that arising under the Wrongful Death Act of West Virginia.

2. Where death results from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by a wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such

right is given; but where admiralty adopts a state wrongful death statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which the state statute makes a part of its existence.

3. The West Virginia Wrongful Death Act created a new cause of action for the benefit of certain beneficiaries named therein, and does not perpetuate a cause of action which the deceased may have had before his death. The West Virginia statute's limitation upon the amount of recovery for wrongful death is a part of the substantive right created by the Act. Therefore, where, as in this case, the West Virginia Wrongful Death Act is adopted as a basis for recovery, the admiralty court must enforce and apply the provisions of that Act which limit the maximum amourt of recovery in such actions.

4. The West Virginia Wrongful Death Act does not afford a remedy for unseaworthiness of a vessel and does not recognize any species of liability without fault. Furthermore, at the time of his death Goett was not "doing a seaman's work", and was not a person within the application of the doctrine of recovery for "unseaworthiness."

5. The barge was not "unseaworthy", and Carbide was not required to furnish or equip it with life rings, buoys, railings or stanchion lines, or other life saving equipment, the absence of which is complained of by the petitioner.

6. Any recovery in this case must be based on negligence on the part of Carbide. Carbide was not negligent in failing to furnish or mount life rings, buoys, railings or stanchion lines on the barge, or in failing to provide other life saving equipment, the absence of which is com-

plained of by the petitioner; but if Carbide was negligent in any such respect, Goett was guilty of contributory negligence, which bars recovery in this case. The doctrine of contributory negligence, as an absolute bar to recovery, is a part of the substantive law of West Virginia applicable to actions for wrongful death, and as such it is applicable to this case based on the West Virginia Wrongful Death Act. Likewise, if Carbide was negligent, recovery is nevertheless barred because Goett assumed the risk that caused his death; and the doctrine of assumption of risk also being a part of the substantive law of West Virginia, applicable to actions for wrongful death, it is applicable in this case. The District Court clearly erred in failing to find, as a matter of law, that Goett was guilty of contributory negligence, and that he assumed the risk that caused his death.

7. The Court of Appeals did not reach or decide any of the questions that might otherwise arise on Carbide's third-party complaint, asserting a right to indemnity against Amherst, and none of such questions are presented by the petition for certiorari. However, should this Court reverse the decision of the Court of Appeals, and hold that Petitioner is entitled to recover against Carbide, then Carbide's claim for indemnity against Amherst will of course become pertinent, and Amherst is in doubt as to whether or not this Court might, in such event, consider and decide Carbide's claim for indemnity against it. Accordingly, the position of Amherst with respect to such claim for indemnity will be set forth and discussed in this brief. With respect to the question of indemnity, Amherst asserts that its barge repair contract with Carbide does not, by its terms, bind Amherst to indemnify Carbide under any circumstances; and certainly can not be construed as binding Amherst to

indemnify Carbide for liability resulting either in whole or in part from Carbide's own fault or negligence. Therefore, Carbide's claim has no basis in any express contract of indemnity.

Any claim by Carbide to recover from Amherst must rest upon contractual right; and, since there is no express promise of indemnity, there can be no contractual right of indemnity unless such a promise can be implied from the facts and circumstances of the case; and no such contract of indemnity can be implied from the facts and circumstances here.

The District Court found that Amherst was not guilty of any negligence and had not breached any duty owed by it. That finding must stand unless clearly erroneous. Since Amherst was not negligent, and breached no duty owed by it, no contract to indemnify Carbide for liability, if any, arising from Goett's death, can be implied. Even if it should be found, contrary to the finding of the District Court, that Amherst was guilty of negligence that proximately contributed to Goett's death, still no promise to indemnify Carbide for any liability on its part should be implied; for, if Carbide is liable for Goett's death, such liability can be predicated only on its own failure to furnish and equip its barge with life saving equipment, and therefore arises out of a risk or danger created by it; whereas negligence, if any, on the part of Amherst, could, consist only of failing to remedy or take precautions against any conditions or defects created by Carbide. Amherst did not contract to remedy patent defects or dangers created by Carbide, and no contract to indemnify Carbide against the consequences of risks of its own creation, should be implied. A contract of indemnity will be implied in such cases, only where the owner of the vessel is made liable, by action of law, for

a defect or danger created by the contractor, without any actual fault or neglect of the owner; and this is not such a case. Therefore, even if Carbide is held liable, it should have no right of indemnity against Amherst.

VI.

Argument

1. The Maritime Law Does Not Allow Recovery For Wrongful Death, Independently Of A Federal Or State Statute Creating Such Right of Action.

In *The Harrisburg* (1886) 119 U. S. 199, it was held that, "by the common law no civil action lies for an injury which results in death," and that since "the maritime law, as accepted and received by maritime nations generally, leaves the matter untouched", no action at law can be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or waters navigable therefrom, caused by negligence, in the absence of an act of Congress, or a statute of a state, giving a right of action therefor. This rule has been affirmed in many subsequent decisions, down to the present, including: *Butler* vs. *Boston & Savannah S. S. Co.* (1888), 130 U. S. 527; *Deslions* vs. *Compagnie Generale Transatlantique* (1908), 210 U. S. 95; *Western Fuel Co.* vs. *Garcia* (1921), 257 U. S. 233; *Lindgren* vs. *U. S.* (1930), 281 U. S. 38; *Just* vs. *Chambers* (1940), 312 U. S. 383; *Levinson* vs. *Deupree* (1952), 345 U. S. 648; *Kernan* vs. *American Dredging Co.* (1958), 355 U. S. 426; *The Tungus* vs. *Skovgaard* (1959), 358 U. S. 588.

The Petitioner says that the Court "erred" in *The Harrisburg*, in its holding that the maritime law historically left the common law rule untouched. We submit, however, that whether the Court in *The Harrisburg* was

correct or incorrect in its interpretation of ancient maritime precedents, the rule of that case has long since become a part of the maritime law, as accepted by the United States, and ought not now to be changed upon the assumption that *The Harrisburg* misconceived the ancient maritime law, existing before the development of a body of maritime law in this country.

In *Butler* vs. *Boston & Savannah S. S. Co.*, supra, the Court said that the maritime law itself "is that which has always been received as maritime law in this country, with such amendments and modifications as Congress may from time to time have adopted." While the "law of the sea" is in a peculiar sense an international law, its specific rules, to be applied in our courts, are those which have been accepted by the United States. *Lauritzen* vs. *Larsen* (1952) 345 U. S. 571. Through long acceptance, the rule of *The Harrisburg* has become the maritime law of the United States. *The Tungus* vs. *Skovgaard*, supra.

The petitioner says that the rule of *The Harrisburg* "cannot be socially or morally defended", and that this Court should now "declare and effectuate" a contrary rule "in the light of fundamentally altered conditions." While it is true that the common law rule has long been widely criticized, we submit that it has become well established that its alleviation, where deemed necessary, should be approached by legislative action, and not by judicial abrogation. Congress has considered and dealt with the effect of the maritime law, and the manner and extent of its proper alleviation, in the Death On The High Seas Act, 46 U.S.C.A. 761, et seq., and the Jones Act, 46 U.S.C.A. 688. The legislatures of nearly all of the states have enacted statutes substantially embodying the provisions of Lord Campbell's Act, in so far as the right to maintain an action for wrongful death is concerned, and

this Court had held that "where death upon such waters results from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act, the admiralty Courts will entertain a libel in personam for the damages sustained by those to whom such right is given." *Western Fuel Co.* vs. *Garcia*, supra; *Levinson* vs. *Deupree*, supra. We respectfully submit that this long and carefully developed state of the law ought not to be destroyed, or substantially altered, except by further Congressional action.

2. Where Admiralty Adopts a State Wrongful Death Statute As a Rule of Right To Be Administered Within Its Own Jurisdiction, It Must Take The Right Subject To The Limitations Which Have Been Made a Part Of Its Existence.

In *The Harrisburg*, supra, the Court said that "it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence." Accordingly, it was held in that case, and also in *Western Fuel Co.* vs. *Garcia*, supra, that the time limitations fixed by state wrongful death statutes operate as a limitation of the liability itself as created, and must be applied in admiralty suits based on such statutes.[1] By like reasoning it was held in *Levinson* vs. *Deupree*, supra, that where the state statute vests the right of action in decedent's personal representative, "it is not for the forum provided by another jurisdiction to vest the right elsewhere." In *Garrett* vs. *Moore-McCormack Co.* 317 U. S. 239, 245, it was stated that: "Admiralty courts when invoked to pro-

[1] See also: *Continental Casualty Co. vs. The Benny Skou* (CCA 4 1952) 200 F. 2d 246.

tect rights rooted in state law endeavor to determine the issues in accordance with the substantive law of the state." This rule was recently approved in *The Tungus* vs. *Skovgaard*, supra.[2]

It follows from the principle referred to, that where, as in this case, the West Virginia Wrongful Death Act is adopted as a basis of recovery, the admiralty courts must enforce and apply the provisions of that statute, which limit the maximum amount of recovery in such actions to $20,000. Such a limitation is a "limitation of the liability itself as created", in the same manner and to the same extent as the limitations on the time for bringing such a suit, or the limitations restricting the right to sue to the personal representative, which, it was held in *The Harrisburg*, supra, and *Levinson* vs. *Deupree*, must be applied and enforced.[3]

The West Virginia statute's limitation upon the amount of recovery is a part of the substantive right created by the Act. The statute does not revive the decedent's cause of action but creates an entirely new cause of action, and the limitations imposed by the statute are "an essential restraining element of the right of action given." *Lambert* vs. *Ensign Mfg. Co.*, 42 W. Va. 813, 26 S. E. 431; *Dunsmore* vs. *Hartman*, 140 W. Va. 357, 84 S. E. 2d 137. The West Virginia statute, W. Va. Code, Chapter 55, Article 7, Section 8, permits the survival of a cause of action accrued prior to the decedent's death, only if an action was commenced before death, in which event the pending action is conformed to the statutory action for wrongful death. *Alloy* vs. *Hennis Freight Lines*, 139 W. Va. 480, 80 S. E. 2d 514.

[2] See also: *Niepert vs. Cleveland Electric Illuminating Co.* (CCA 6) 241 F. 2d 916, cert. den. 354 U. S. 909; *Curtis vs. A. Garcia y Cia* (CCA 3) 241 F. 2d 30.

[3] See: *Quinnette vs. Bisso* (CCA 5) 136 F. 825.

Petitioner's argument that application of the particular limitations of the West Virginia statute, to limit the amount of recovery in admiralty suits based on that statute, is "contrary to the avowed policy of the admiralty jurisdiction to insure harmony and uniformity in the essential characteristics of the maritime law", has already been considered and rejected by this Court. *Western Fuel Company* vs. *Garcia*, supra, *The Tungus* vs. *Skovgaard*, supra.

If the limitations which are a part of the right created by the West Virginia statute, could not be accepted by the admiralty courts, the end result would be to exclude altogether the application of the state statute in such courts; for the admiralty courts could not reasonably look to the state statute for a right of action not given by maritime law, and then, in effect, rewrite the state statute to "harmonize" with "maritime law" or "admiralty policy." *Garrett* vs. *Moore-McCormack Co.*, supra; *The Tungus* vs. *Skovgaard*, supra.

The District Court was therefore correct in its ruling that any recovery in this action is limited to the $20,000 maximum permitted by the West Virginia Wrongful Death Act.

3. The West Virginia Wrongful Death Act Does Not Permit Recovery Based Upon Unseaworthiness.

The Circuit Court of Appeals noted that "there is a division of opinion whether a suit under a statute like the West Virginia Wrongful Death Act can be based on unseaworthiness", and stated that it was not necessary to decide "whether a suit in admiralty under the West Virginia Act can ever be based on unseaworthiness, because Goett was not a person to whom the warranty of seaworthiness ran, and because we do not agree with the

finding of the District judge that the barge was unseaworthy." Thus, unlike *The Tungus* vs. *Skovgaard*, supra, there is no determination by the Court of Appeals here, that a claim for unseaworthiness is encompassed by the West Virginia Act as a matter of state law.

While we agree with the Court of Appeals, that for the reasons stated by it, it is unnecessary to decide the question in this case, we nevertheless submit that the West Virginia Act does not encompass a claim based upon unseaworthiness alone.

As we understand it, the doctrine of unseaworthiness comprehends a species of liability without negligence, based upon an implied warranty. The West Virginia Wrongful Death Act does not permit the imposition of liability without fault; and does not permit recovery *ex contractu* and no recovery can be had against a party thereunder, in such an action as this, without proof of negligence. *Osborne* vs. *Chesapeake & Potomac Telephone Co.*, 121 W. Va. 357, 3 S. E. 2d 527; *Jones* vs. *Rinehart & Dennis Co.*, 113 W. Va. 414, 168 S. E. 482; *State ex rel Yost* vs. *Scouszzio*, 126 W. Va. 135, 27 S. E. 2d 451; *Gilkerson* vs. *B. & O. R. Co.*, 129 W. Va. 649, 659, 41 S. E. 2d 188. Thus, there can be no recovery against Carbide in this case without sufficient proof of actual negligence on its part. Liability can not be predicated against Carbide, under the West Virginia Act, upon the theory that Carbide is liable, without any actual negligence, for the breach of a non delegable duty of seaworthiness. *Lee* vs. *Pure Oil Co.*, (CCA 6) 218 F. 2d 711; *Graham* vs. *A. Lusi*, (CCA 5) 206 F. 2d 223.

4. Goett Was Not A Person To Whom The Warranty of Seaworthiness Ran.

Assuming, *arguendo*, that a claim based upon seaworthiness could be encompassed by the West Virginia

Act, it is submitted that the Court of Appeals was correct in holding that "Goett was not a person to whom the warranty of seaworthiness ran."

The doctrine of recovery for unseaworthiness, as this Court recently pointed out in *Pilots Association* vs. *Halecki*, 358 U. S. 613, defines a duty "which the owner of a vessel owes to the members of the crew who man her." The justification or reason for the rule is noted therein. While the application of the rule has been extended to other persons, not members of the crew, who are performing work "traditionally done by members of the crew", it has not been so far extended as to include all persons who may be engaged in work upon the vessel, regardless of the nature of such work or the circumstances of its performance.

In its normal operation on the river, the barge in this case had no crew. It was, as stated by the Court of Appeals, an unmanned vessel. At the time of the accident in this case the barge had been turned over by Carbide to Amherst for major repairs, including sandblasting and painting of the entire hull, and the installation of "Butterworth hatches." The repairs were such as required the barge to be removed from the water and "dry-docked" on Amherst's marine railway, although that had not yet been done at the time of Goett's death. It is clear that the very reason that the barge was turned over to Amherst was because the work to be done did not fall within the province of a crew. The barge was not in navigation at the time of Goett's death, nor was it ready for navigation. It was undergoing major repairs for the very purpose of assuring its continued seaworthiness. Under such circumstances, the Court of Appeals was correct in its holding that "the warranty of seaworthiness

does not apply in that situation." *Pilots Association* vs. *Halecki*, supra.

In *Halecki*, this Court noted its prior decisions in *Seas Shipping Co.* vs. *Sieracki*, 328 U. S. 85, and *Pope & Talbot* vs. *Hawn*, 346 U. S. 406, and distinguished them, saying:

> "Neither these decisions nor the policy that underlies them can justify extension of liability for unseaworthiness to the decedent in the present case. The work that he did was in no way 'the type of work' traditionally done by the ship's crew. It was work that could not even be performed upon a ship ready for sea, but only when the ship was 'dead' with its generators dismantled. Moreover, it was the work of a specialist, requiring special skill and special equipment—portable blowers, air hoses, gas masks, and tanks of carbon tetrachloride, all brought aboard the vessel for this purpose, and none connected with a ship's seagoing operations."

What was said there is equally applicable here. The work that Goett was doing could not be performed upon a barge ready for use on the river, but called for dry-docking, without which the sides and bottom of the barge would have been inaccessible. It was the work of specialists, requiring the skill of sandblasters and welders, and special equipment—portable air compressors, sandblasting hoses and nozzles, protective hoods and respirators, all brought aboard the barge for the particular purpose of the work in progress. The work was of such a nature that it could only be performed when the barge was laid up, and out of its customary operation by Carbide.

Seas Shipping Co. vs. *Sieracki*, supra; *Pope & Talbot* vs. *Hawn*, supra, *Alaska Steamship Co.* vs. *Petterson*, 347

U. S. 396; *Rogers* vs. *United States Lines*, 347 U. S. 984,[4] and *The Tungus* vs. *Skovgaard*, supra, all involved situations in which the work performed was incident to loading or unloading of the vessel as an incident to a voyage. No such function is involved here.

It is respectfully submitted that Goett's status was not that of a seaman, and that it is not proper to speak of the absence of life saving equipment, such as is complained of as the basis of recovery here, as constituting "unseaworthiness" with respect to him.

5. The Barge Was Not Unseaworthy.

Assuming, *arguendo*, that a claim based on unseaworthiness can be maintained under the West Virginia Wrongful Death Act, and assuming that Goett was within the application of that doctrine, still the Court of Appeals was correct in its further holding that the barge was not unseaworthy. The Court said: (R. p. 249):

> "The barge was not unseaworthy. In its ordinary operation, it was unmanned, and did not require life saving equipment. It did not become unseaworthy when men went aboard after it had been turned over to a repair yard under the circumstances of this case. *Lester* vs. *United States*, 2 Cir., 234 F. 2d 625, cert. den. 352 U. S. 889."

This view is warranted by the law and the evidence. The warranty of seaworthiness is not a warranty that the vessel, its gear or equipment is absolutely safe as against all contingencies or for all purposes. *Boudoin* vs. *Lykes*

[4] Per curiam decision, reversing 205 F. 2d 57 (CCA 3).

[5] *Raidy vs. United States* (CCA 4) 252 F. 2d 117, cert. den. 356 U. S. 973, *Berryhill vs. Pacific* (CCA 9) 238 F. 2d 385, cert. den. 354 U. S. 938; *West vs. United States* (CCA 3) 256 F. 2d 671, cert. granted, and now pending in this Court; *Berge vs. National Bulk Carriers* (CCA 2) 251 F. 2d 717, cert. den., 356 U. S. 958.

Bros. S. S. Co., 348 U. S. 336. This barge, as operated and maintained by Carbide, was intended for operation in tows on the river. As such, it was unmanned. There is no evidence that the operation of the barge in such a manner reasonably required the mounting of railings, stanchion lines, life rings or buoys, as necessary to establish its seaworthiness. On the contrary, the evidence is that it was not normal or customary for such barges to be so furnished or equipped (R. pp. 138-139). Even petitioner's own "expert" testified that it is not reasonable or practical for a barge to carry such equipment in normal operation (R. p. 123), and that it is not customary for such barges to do so (R. p. 124). The barge and its equipment had been certified, inspected and approved by the Coast Guard (R. p. 217). Applicable Coast Guard Regulations do not require that such barges be equipped with the devices, the absence of which is alleged to have rendered it unseaworthy (R. p. 136). It is therefore submitted that the District Court was clearly wrong in finding the barge unseaworthy, and the Court of Appeals was correct in holding that it was not unseaworthy.

6. Carbide Was Not Guilty of Negligence.

For the reasons hereinbefore stated, the Petitioner's right to recover in this case must depend upon the question whether or not Carbide was negligent. That question must be determined in accordance with the substantive law of West Virginia. *Garrett* vs. *Moore-McCormack*, supra; *The Tungus* vs. *Skovgaard*, supra. It is submitted that, when so tested, the evidence shows that the Court of Appeals was correct in its holding that Carbide was not negligent.

To constitute actionable negligence there must be a breach of some duty owed to the person who is injured: *Uthermohlen* vs. *Bogg's Run Company*, 50 W. Va. 457,

40 S. E. 410. Under West Virginia law, a property owner owes to an independent contractor, going on his property to perform work, only the duty of correcting or pointing out such latent defects or dangers as may not be known to the contractor and his employees. *Sesler* vs. *Rolfe Coal & Coke Co.*, 51 W. Va. 318, 41 S. E. 216.

It is not contended in this case that any of the conditions which allegedly lead to Goett's death, constituted latent defects or hazards. On the contrary, all of the things alleged to be defects or dangers were patent in character, and fully as discernible by Amherst, and by Goett, as by Carbide.

In *Lynch* vs. *United States* (CAA 2) 163 F. 2d 97, 99, Judge Learned Hand stated in a concurring opinion:

> "The duty (of a shipowner to employees of an independent contractor) is therefore only to advise them of any known dangers, or any that would have been discovered by reasonable care. This duty if sometimes put as though it was the same as providing a safe place to work, but, strictly speaking, that is not true. The shipowner is not responsible for giving them a safe place to work; all he need do is to discover any dangers and tell them."

Under the circumstances of this case, it would not be reasonable to say that Carbide was negligent simply because it did not point out to Goett the perfectly obvious fact that there were no railings, stanchion lines, life rings or buoys on the barge.

7. If Carbide Was Negligent, Recovery Is Barred By Goett's Assumption Of Risk And Contributory Negligence.

Assumption of risk and contributory negligence are absolute bars to recovery under the West Virginia Wrongful Death Act. *Barr* vs. *Curry*, 137 W. Va. 364, 71

S. E. 2d 313; *McKelvey* vs. *C. & O. Ry. Co.*, 35 W. Va. 500, 65 S. E. 334. The District Court correctly ruled that such defenses are available to the respondents, as a part of the substantive law of West Virginia. *Garrett* vs. *Moore-McCormack*, supra; *The Tungus* vs. *Skovgaard*, supra.* The District Court found, however, that "under the circumstances of this case Goett did not assume the risk of the danger which caused his death." In support of that view, the District Court said: (R. pp. 196-197)

> "I think it is not necessary to decide whether he did or did not assume the risk of falling over the side of the boat. It was not the fall that caused his death. The cause of his death, as I have found in my findings of fact, was the failure of Union Carbide and Carbon Corporation to have available rescue equipment, and that is a risk which I conclude Goett did not assume."

We submit that the risk of falling overboard, and the risk of drowning because of a lack of rescue equipment, were inseparable and correlative, and that, in any event, Goett clearly assumed all of the risks that were involved in his death.

The doctrine of assumption of risk in West Virginia rests on two premises: first, that the nature and extent of the risk are fully appreciated; and second, that it is voluntarily incurred. *Hunn* vs. *Windsor Hotel*, 119 W. Va. 215, 193 S. E. 57. The evidence shows that both the risk of falling overboard and the accompanying risk of drowning

---

* See also: *Niepert vs. Cleveland Electric Illuminating Co.* (CCA 6) 241 F. 2d 916, cert. den. 354 U. S. 909; *Quinnette vs. Bisso* (CCA 5) 136 F. 825; *Hartford Acc. & Ind. Co. vs. Gulf Refining Co.* (CCA 5) 230 F. 2d 346; *Graham vs. A. Lusi, Ltd.* (CCA 5) 206 F. 2d 223; *Curtis vs. A. Garcia y Cia* (CCA 3) 241 F 2d 30.

Elsewhere in its findings, however, the District Court, in defining Carbide's supposed breach of duty, stated (R. p. 196): "* * I am thinking in that connection of measures such as life lines or stanchions, as they are called, to prevent falling off the unprotected deck; * *."

through a lack of available rescue equipment, were so obvious that they could not have escaped Goett's full knowledge. He had been engaged in similar work for Amherst for months, and had been working on the deck of the CC-204 for a day and a half before his death. The situation of the barge, and all of the conditions upon the barge were apparent almost at a glance. Goett could not have worked on the barge for even a few minutes without being aware that the barge was afloat on the river; that there was no railing around its decks; that there were no life rings or buoys on the barge; that there were no lines or other rescue equipment aboard; that a fall from the barge into the river was possible; and that a person who could not swim might drown, if he fell in the river.

Under these circumstances, the evidence requires a finding that Goett was aware of the risks, and being aware of them, he must necessarily have appreciated the danger manifestly inherent in them. The dangers were so obvious as to preclude an inference that Goett was unaware of them. *Delaware L. & W. R. Co.* vs. *Koske*, 279 U. S. 7; *Jacobs* vs. *Southern Ry. Co.*, 241 U. S. 229.

In *Childress* vs. *Ry. Co.*, 111 W. Va. 92, 160 S. E. 564, it was held that:

> "Ordinary risks of an occupation are assumed by an employee whether he is actually aware of them or not; and a risk not naturally incident to the occupation is also assumed; where the employee knows of it and appreciates the danger, or where the risk and the danger are so obvious as to preclude the inference that he was unaware of them."

In *Purkey* vs. *Southern Coal Co.*, 57 W. Va. 595, 50 S. E. 755, it was said:

See also: *Seaboard Ry. vs. Horton*, 233 U. S. 492; *Blackley vs. Powell*, (CCA 4) 68 F. 2d 457.

> "The plaintiff claims that the defendant failed to furnish him a safe place to work, but, whether this be so or not, the plaintiff knew of the danger which he says rendered the place unsafe, and, knowing of the danger, voluntarily encountered it, and having done so, he is charged with having assumed the extra hazard, and for that reason, cannot recover. It is the master's duty to furnish his servants a safe place, and when the servant enters the employment of the master, he may presume that the master has done so; but this is only a presumption, and when it is apparent to the servant that the place is unsafe, and he then continues in the employment, he thereby assumes the additional risk."

It is not material that Goett's employer directed him to work on the barge. In *Farley* vs. *Ry. Co.*, 67 W. Va. 350, 67 S. E. 1116, the Court held that:

> "One is not bound to assume the risk of a known danger because he is directed to do so by another; he must think and act for himself; and if he relies upon another's judgment and does an act contrary to his own sense of prudence, he is negligent."

Pritchard vs. *City Lines of W. Va.*, 136 W. Va. 278, 284, 66 S. E. 2d 276, is in accord with that view.

It is therefore submitted that the District Court was clearly wrong in its finding that Goett had not assumed the risk that resulted in his death. The Court of Appeals did not deem it necessary to pass on that question.

Under West Virginia law, the defense of contributory negligence is distinct from that of assumption of risk;

See also: *Laverty vs. Hambrick*, 61 W. Va. 687, 57 S. E. 240; *Williams vs. Coal & Coke Co.*, 55 W. Va. 84, 46 S. E. 802; *Oliver vs. Ohio River R. Co.*, 42 W. Va. 703, 26 S.E. 444; *Woodell vs. W. Va. Imp. Co.*, 38 W. Va. 23, 49-50, 17 S. E. 386; *State ex rel Cashman vs. Sims*, 130 W. Va. 430, 446, 43 S. E. 2d 805.

it being said that "the essence of contributory negligence is carelessness; of assumption of risk, venturousness." *Hunn* vs. *Windsor Hotel*, supra.

One minute before he was discovered in the water, Goett was seen by the witness, Goodwin, within three feet or less of the outboard edge of the barge. Despite his proximity to the edge of the barge, he was facing inboard, with his back to the river, thus depriving himself of such opportunity to observe his proximity to the edge of the deck as the protective hood he was wearing would otherwise have permitted. In addition, he was walking backward. About one minute later he was seen in the river. These undisputed facts require a conclusion that Goett was not keeping a proper lookout for his own safety, and simply backed over the edge of the barge.

One who works in surroundings known to be hazardous must maintain watchfulness appropriate to the hazards, and cannot recover for an injury resulting from inattention to his surroundings. Thus, in *Jones* vs. *Railway Co.*, 74 W. Va. 666, 83 S. E. 54, it was held that a railway yard employee who stepped into the path of a moving train, could not recover, regardless of his employer's negligence. The law charges a person with a duty to see that which is plainly to be seen. *Craft* vs. *Fordson Coal Co.*, 114 W. Va. 295, 171 S. E. 886. Even where an employee's work is rendered hazardous by defective or inadequate equipment and appliances, he is guilty of contributory negligence if he increases the hazard by performing his work in an unnecessarily dangerous manner. *Robinson* vs. *Coal Co.*, 78 W. Va. 94, 88 S. E. 620.

In *Priddy* vs. *Coal Co.*, 64 W. Va. 242, 61 S. E. 163, a coal miner was injured while pushing a coal car across a trestle from which the employer had removed certain

planks in the course of repairs. The removal of the planks created a hole in the platform over which the plaintiff was pushing the cars. Although plaintiff denied that he knew of the hole, the evidence showed that he had pushed a number of cars over it prior to the accident. The Court held that the evidence required an inference that plaintiff knew of the hole, and that his falling into it constituted "contributory negligence", as a matter of law. The Court said:

> "* * * We must therefore say, if human evidence can reasonably establish anything, that Priddy not only could and should have known of this hole in the platform, but in fact did know of it and therefore we must apply the law * * * holding that, 'When an employee wilfully encounters danger known to him, or patent and open to be seen and known, he cannot recover damages from his employer for injury therefrom. * * * 'Where the servant has equal knowledge with the master of the danger incident to the work, he takes the risk upon himself, if he goes on without.' * * *
>
> "Though a master is bound to give his servant a safe place to work, still if the servant know, or should know, of a patent danger he cannot recover because the law is that where both the master and the servant are negligent there can be no recovery. *Overby* vs. *C. & O. Ry. Co.*, 37 W. Va. 524. * * *"

It is accordingly submitted that recovery in this case is barred by contributory negligence and that the District Court clearly erred in failing to so find. It not being necessary to its decision, the Court of Appeals likewise declined to pass upon this question.

Holley vs. *The Manfred Stansfield*, (CCA 4) 269 F. 2d 317, does not require a contrary conclusion. In that case the Court held that under the Virginia Wrongful Death Act, the maritime rule of comparative negligence ap-

plied where the injury resulting in death occurred on navigable waters of the state. We respectfully submit that, if given the interpretation given it in petitioner's brief, the decision in *The Manfred Stansfield*, supra, is in conflict with the principle established in *The Harrisburg*, *Western Fuel Co.* vs. *Garcia* and *The Tungus* vs. *Skovgaard*, supra; and that it is hardly to be supposed that any state has not intended to establish uniform legal standards governing actions under its Wrongful Death Act, so that all cases will be treated alike, whether arising on land or water. However that may be, we further submit that it does not follow from the interpretation of the Virginia Act, in *The Manfred Stansfield*, that either the Court of Appeals or the West Virginia Courts would so interpret the West Virginia Act.

In *The Manfred Stansfield*, the Court relied heavily upon the fact that the Virginia statute "specifically covers * * 'wrongful acts or defaults of any ship or vessel' and speaks of the right 'to proceed *in rem* against the ship or vessel'—a procedure available only in admiralty." The Court also noted that Virginia is a state "with considerable maritime business", and that the Virginia Act was drafted "by one well versed in admiralty law", with particular reference to maritime cases. None of these things are true with respect to the West Virginia Act. Moreover, the *Manfred Stansfield* was a libel *in rem* against a vessel, as well as the owner, for which the Virginia act specifically provides, but the West Virginia act does not.

Petitioner argues that the West Virginia Act "follows" the Virginia Act; but in the respects particularly noted and relied upon by the Court of Appeals, in *The Manfred Stansfield*, the West Virginia Act does not "follow" the Virginia Act. If, as the Court of Appeals said in *The*

Manfred Stansfield, the reference of the Virginia statute to "wrongful acts or defaults of any ship or vessel", is persuasive that it intended to apply maritime rules to deaths on navigable waters, then the fact that West Virginia saw fit to omit any such references in its Wrongful Death Act, is equally persuasive that West Virginia did not intend to permit the application of maritime rules under its Act.

The Circuit Court of Appeals in this case expressly refrained from deciding whether or not, under the West Virginia Act, assumption of risk or contributory negligence are a bar to recovery. The District Court held that they are.

8. If Carbide Is Liable, It Is Not Entitled to Indemnity From Amherst.

Even if it should be held that Petitioner is entitled to recover from Carbide in this case, Carbide is not entitled to recover on its third party complaint seeking indemnity from Amherst. The District Court denied recovery on the third party complaint; and the Court of Appeals did not reach that question.

The District Court found that, "no negligent act of the third party defendant (Amherst) contributed proximately to cause the death of Mr. Goett." (R. p. 237). The Court of Appeals did not reach or pass upon that finding. It must stand unless clearly erroneous. *McAllister* vs. *United States*, 348 U. S. 19. However, even if it be assumed that Amherst and Carbide were both negligent, Carbide can not recover from Amherst on any theory of contribution. *Halcyon Lines* vs. *Haenn*, 342 U. S. 282; and Carbide can have no right of indemnity against Amherst, except upon proof of a contractual right.[10]

[10] See: *Brown vs. American-Hawaiian S S. Co.* (CCA 3) 211 F. 2d 16.

Carbide relies upon two provisions of its "purchase order" contract for the repair of the barge, as giving rise to an express right of indemnity. The first of these provisions reads as follows:

> "INSTALLATION: In the event that any articles ordered hereunder require, in connection with the installation thereof, the services of a supervisor, expert, or other employee connected with or employed by Seller (Amherst), and Seller (Amherst) agrees to furnish the same, either with or without charge, such supervisor, expert or other employee in performing such service shall not be deemed to be the agent or employee of Buyer (Carbide), and Seller (Amherst) assumes full responsibility for his acts and omissions and exclusive liability for any payroll taxes or contributions imposed by any federal or state law dealing with any of the subjects covered by the Federal Social Security Act approved August 14, 1935."

It is submitted that this provision can not be construed as a promise to indemnify Carbide. It is to be noted that the "purchase order" was a form contract prepared by Carbide for use in a multitude of varying transactions, and was not designed with particular application to the specific barge repair job here in question. The above quoted "Installation" provision was clearly not intended to provide for indemnity, but was intended to avoid the possibility that a contractor's employees might, in some circumstances, be construed to be employees of Carbide, thus subjecting the latter to possible liability for wages, payroll taxes, or workmen's and unemployment compensation contributions, or possible liability to third persons based upon the doctrine of *respondeat superior*.

Moreover, the words "Seller assumes full responsibility for *his* acts and omissions", refers to acts and omissions of "a supervisor, expert, or other employee con-

nected with or employed by *Seller*", and can not be construed as binding Amherst to assume responsibility for "acts and omissions" of Carbide.

If Carbide is to be held liable in this case, it must be on account of some negligent act or omission of its own; and since the plain language of the "Installation" clause of the contract does not purport to make Amherst "responsible" for negligent acts or omissions of Carbide, but only for those of "a supervisor, expert, or other employee connected with or employed by Seller (Amherst)", the "Installation" clause furnishes no basis for Carbide's claim to indemnity.

The second provision of the purchase order, relied upon by Carbide as a basis of its claim for indemnity, is as follows:

> "INSURANCE: If this agreement provides for work to be performed by Seller (Amherst Barge Company) on property owned or controlled by Buyer (Union Carbide & Carbon Corporation), or on property of others named herein, Seller shall insure to each of its employees engaged upon the work the compensation provided for by, and shall strictly comply with, each and every statute applicable thereto with respect to Workmen's Compensation and or Employer's Liability and shall procure and maintain, at the cost and expense of the Seller, until final acceptance of the work by the Buyer, Public Liability Insurance in a reputable and financially responsible insurance company, properly safeguarding the Seller against liability for injuries to persons, including injuries resulting in death, in amounts acceptable to the Buyer, and shall furnish to Buyer written certificates from insurance carries or from appropriate Governmental authorities establishing that said insurance of employees and said Public Liability

> Insurance have been procured and are being properly maintained, and that the premiums therefor are paid, and specifying the names of the insurers and the respective policy numbers and expiration dates. All such insurance policies shall provide (unless by statute applicable thereto it is otherwise provided) that in the event of cancellation thereof, written notice of such cancellation shall be effective date of such cancellation."

This provision, upon its face, and by its plain terms, does nothing more than require Amherst to comply with applicable compensation statutes protecting its employees, and to maintain public liability insurance "properly safeguarding the Seller (Amherst) against liability." These requirements were fully complied with by Amherst. The "Insurance" clause does not purport to bind Amherst to indemnify Carbide under any circumstances.

Carbide's claim for indemnity must be determined in accordance with the substantive law of West Virginia. Under West Virginia law, a contract will not be construed as undertaking to indemnify another for the consequences of his own negligence, in the absence of a clear expression of such intent. In *Washington & Berkeley Bridge Co.* vs. *Pennsylvania Steel Co.*, (CCA 4) 215 F. 2d 32, 34, a case arising under West Virginia law, it was said that: "The presumption is exceedingly strong against an undertaking by anyone except an indemnity company to be responsible for the negligent acts of another." Also, this purchase order was a form contract prepared by Carbide, and any uncertainties that might arise as to its meaning must be resolved against Carbide. *Price* vs. *Stonega Coke & Coal Co.*, 26 F. Supp. 172, modified, 106 F. 2d 411, cert. den., 308 U. S. 618. Certainly it cannot be construed as binding Amherst to indemnify

Carbide for liability resulting from Carbide's own negligence.

We submit that the construction properly to be given to the "Insurance" provision of the purchase order, is that given to a like provision in *Weldon* vs. *U. S.* (CCA 1) 65 F. 2d 748. In that case, an employee of a stevedore company sued for an injury caused by the breaking of a ladder on a vessel owned by the United States. The latter appealed from an order denying its motion to implead and recover indemnity from the stevedore company, based upon a contract which provided:

> "13. The stevedore shall at its own cost and expense carry the following insurance protection:
>
> (a) Liability arising under Workmen's Compensation laws of the state in which the stevedoring is performed for injury to or death of employees and also liability arising under the provisions of the Act of Congress approved March 4, 1927, entitled 'Longshoremen's and Harbor Worker's Compensation Act.'
>
> (b) Employer's Liability for which the stevedore is legally liable to employees in the amount of $50,000, etc.
>
> (c) Liability to the public in the amount of $50,000."

In holding that these provisions did not give rise to any right of indemnity, the Court said:

> "* * * Giving the language of the contract its natural meaning, the phrase 'insurance protection', as therein used, refers to the protection of the stevedore. The liabilities to be covered are expressly stated. * * * The intent of the contract obviously is that the stevedore shall carry insurance to protect its obligations to its employees and to the general public, in case of accidents arising

> out of its work. If it had been intended that the stevedore should also carry insurance protecting the owner of the vessel against claims for negligence based on defects in its permanent structure, it cannot be doubted that the contract would have said so."

The West Virginia rule that a contract will not be construed as binding one party to indemnify another for his own negligence, in the absence of an unequivocal expression of such intent, is widely recognized in other jurisdictions. *Halliburton Oil Well Cementing Co.* vs. *Paulk* (CCA 5) 180 F. 2d 79; *Buckeye Cotton Oil Co.* vs. *Louisville & N. R. Co.* (CCA 6) 24 F. 2d 347; *Mostyn* vs. *Del. L. & W. R. Co.* (CCA 2) 160 F. 2d 15; *American Mutual Liability Ins. Co.* vs. *Matthews,* (CCA 2) 182 F. 2d 322.

This case is very different from *Porello* vs. *United States,* (CCA 2) 153 F. 2d 605. In that case, which was an action for personal injuries, arising under the Public Vessels Act, 46 U.S.C.A. Sec. 781, the "insurance" provision of the contract in question went much farther than the provision here. In addition to prescribing that the contractor should carry insurance protection against Longshoremen's Act liability, it expressly provided that: "The Stevedore * * * shall be responsible for any and all damage or injury to persons and cargo while loading or otherwise handling or stowing the same, * * * through the negligence or fault of the Stevedore, his employees and servants." The question raised there was whether this imposed upon the Stevedore, (1) liability for his own negligence alone; or, (2) entire liability for joint negligence of himself and the owner; or, (3) proportionate liability for the comparative negligence of himself and the owner.

The Court of Appeals, in *Porello,* did not say that the

mere contract of the stevedore, to carry insurance protecting its employees, constituted a promise to indemnify the owner; but that the further, express promise to "be responsible for any and all damage or injury * * * through the negligence or fault of the stevedore", should be construed as a promise to indemnify the owner for liability resulting either wholly or in part from negligence of the steyedore. The Court reached that conclusion by reasoning that the stevedore's agreement to carry "compensation insurance" forbade a construction that the subsequent indemnity clause intended to indemnify the owner for liability from negligence of the stevedore alone, because, having insured, the stevedore "would not be liable to the person injured", and it was therefore "reasonable to construe the clause to cover cases where in respect to the injured person both the contractor and the shipowner are at fault."

This Court, in reviewing the Court of Appeals decision, in *United States* v. *Porello,* 330 U. S. 446, stated that the contract clause was ambiguous, and remanded the case for a determination by the District Court as to the intent of the parties. Upon remand, the District Court adopted the interpretation of the Court of Appeals, 94 F. Supp. 952.

The instant purchase order contains no provisions such as that at issue in *Porello.* Nor has either the District Court or the Court of Appeals found any promise of indemnity in the language of the purchase order in this case. On the contrary, the District Court found that no right of indemnity exists; it being expressly stated that "the contract is not in any sense ambiguous." (R. p. 237).

Therefore the purchase order contract creates no express right of indemnity, and no such right exists, unless

it can be implied from the facts and circumstances of the case. We submit that no right of indemnity can be so implied here.

As previously noted, the District Court found that Amherst was not negligent. More specifically, the District Court found that Amherst was not guilty of failing to provide railings, stanchion lines or life saving equipment on the barge, and that it was Carbide's duty not Amherst's to provide such equipment. In the absence of negligence, i.e., a breach of duty, upon Amherst's part, there can be no implied contract to indemnify Carbide for any damages awarded against it. *United States* vs. *Harrison*, (CCA 9) 245 F. 2d 911.

Assuming, however, that the finding of the District Court, that Amherst breached no duty and was guilty of no negligence, should be set aside as clearly erroneous; Carbide would still not be entitled to indemnity against Amherst. Petitioner's recovery in this case cannot be predicated upon a finding that Amherst alone was negligent, but pre-supposes that Carbide was itself guilty of negligence. If so, then there is no right of indemnity because the law will not imply a contract to indemnify Carbide for liability arising from a patent hazard or defect, created by Carbide itself.

If Carbide is to be held liable in this case, it must be upon a finding that it was negligent in failing to equip its barge with railings, stanchion lines, life rings or buoys, or other life saving equipment. If Amherst was also negligent, its negligence could consist of nothing more than a failure to remedy or guard against such patent hazards or defects created by Carbide's supposed negligence. Amherst did not contract to remedy patent defects created by Carbide, and in the absence of an express promise to do so, such a contract can not be implied.

In *Ryan Stevedoring Co.* vs. *Pan Atlantic S. S. Corp.*, 350 U. S. 124, the plaintiff, a longshoreman, was employed by a stevedoring firm which had contracted with the shipowner to do all the work of both loading and unloading the vessel. When the vessel was loaded with a cargo of paper rolls, the stevedoring contractor negligently failed to place chocks or wedges under the rolls, thus *creating* the peril which later resulted in the plaintiff's injury. When the same stevedoring company subsequently unloaded the same paper rolls in a far distant port, the plaintiff employee was injured because the absence of chocks permitted one of the rolls to roll upon him. The fault of the shipowner consisted only in failing to correct the improper stowage condition created by the negligence of the stevedoring company.

The injured longshoreman sued the shipowner, who impleaded Ryan, seeking indemnity. The trial court denied indemnity. *Palazzolo* vs. *Pan Atlantic S. S. Corp.*, 111 F. Supp. 505. Upon appeal, the Court of Appeals for the Second Circuit reversed the judgment denying indemnity, upon the theory that indemnity is recoverable where the employer's negligence is the "sole", "primary" or "active" cause of the accident. 211 F. 2d 277.

The decision of the Court of Appeals was affirmed by an equally divided Court in a memorandum opinion, 349 U. S. 901; and was later reargued before a full Court and affirmed, four Justices dissenting. The opinion dealt with two questions: first, whether indemnity was barred by the Longshoremen's Act; and, second, whether, under the circumstances there presented, Ryan was liable in indemnity. In answering the first question in the negative, and the second in the affirmative, this Court relied solely upon the contract between the parties. It appears that indemnity was allowed because the Court reasoned

that since Ryan had expressly contracted "to perform all of the shipowner's stevedoring operations at the time and place where the cargo was loaded", and since its failure to perform that duty properly had created the hazard that caused the injury, it would be implied from the contract that Ryan agreed to hold the shipowner harmless for any breach of its promise to stow the cargo safely.

The doctrine of the *Ryan* case was again applied by this Court in *Weyerhaeuser S. S. Co.* vs. *Nacirema Operating Co.*, 355 U. S. 563. In that case the stevedoring contract obligated the stevedore "to faithfully furnish such stevedoring services as may be required," and to provide all necessary labor and supervision for the "proper and efficient conduct of the work." The services of the stevedore were to be rendered in the ports of New York and Boston. While the vessel was in New York the stevedore built a temporary wooden winch shelter on the deck. The shipowner failed to remove the shelter when the vessel left New York for Boston; and while the same stevedore was unloading the ship in Boston, the plaintiff was injured when a board fell out of the winch shelter and struck him while he was at work in the lower hold.

The injured plaintiff sued the owner of the vessel and the owner impleaded the stevedore, claiming indemnity. The plaintiff recovered judgment against the owner, but the trial court directed a verdict on the owner's claim to indemnity. The Court of Appeals affirmed (236 F. 2d 848), on grounds that the shipowner's "independent failure of duty" to remove the winch shelter when the vessel left New York, was not a "foreseeable" consequence of the building of the shelter by the stevedore, and that indemnity was precluded because the injury resulted from the "negligent act of the ship alone."

This Court reversed, holding that the owner was entitled to a jury trial on the question of indemnification. The Court said:

> "We believe that the respondent's contractual obligation to perform its duties with reasonable safety related not only to the handling of cargo, as in *Ryan*, but also to the use of equipment incidental thereto, such as the winch shelter involved here. *American President Lines* vs. *Marine Terminals Corp.*, 234 F. 2d 753, 758; *United States* vs. *Arrow Stevedoring Co.*, 175 F. 2d 329, 331. If in that regard respondent rendered a substandard performance which foreseeingly led to petitioner's liability, the latter was entitled to indemnity *absent conduct on its part sufficient to preclude recovery.*" (Italics ours)

The Court then pointed out that the jury's verdict finding the owner negligent as to the plaintiff, did not *ipso facto* preclude recovery of indemnity by the owner from the stevedore. The Court said:

> "While the jury found petitioner 'guilty of some act of negligence', that ultimate finding might have been predicated, *inter alia*, on a failure of petitioner to remove the shelter when the ship left New York, or a failure to correct or warn respondent of a latent dangerous condition known to petitioner when respondent began the Boston unloading. Likewise, the finding might have been predicated on a failure of petitioner during the five days in Boston to inspect the shelter, detect and correct the unsafe condition. Although any of these possibilities could provide Connolly a basis of recovery, at least the latter would not, under *Ryan*, prevent recovery by petitioner in the third party action. * * *"

It is to be noted that in both the *Ryan* and *Weyerhaeuser* cases, the contractor-employer *created* the dangerous condition, its fault preceded that of the ship-

owner in point of time, and the fault of the shipowner consisted only in failing to remedy a hazard created by the contractor-employer.

The situation here is just the reverse from that in *Ryan* and *Weyerhaeuser*. If Carbide was negligent in failing to equip its barge with safety and rescue equipment, then its negligence *created* the hazard, while Amherst's fault, if any there was, consisted only of a failure to remedy or correct that hazard. *Hagans* vs. *Farrell Lines* (CCA 3) 237 F. 2d 477.

In *Hawn* vs. *Pope & Talbot, Inc.* (CCA 3) 198 F. 2d 800, affirmed, 346 U. S. 406, a carpenter employed by a ship repair firm was injured when he fell through an open and unlighted hatch. He sued the owner, who impleaded the employer, claiming both contribution and indemnity. The jury found that the vessel was unseaworthy and that both owner and contractor were negligent; the owner, presumably in leaving the hatch covers off and failing to light the area, and the contractor in failing to protect its employees against such patent dangers. Judgment was entered for contribution by the contractor-employer, but reversed by the Court of Appeals on the authority of *Halcyon*, supra. The Court also denied the owner's claim to indemnity, saying:

> "The charterer (owner) again urges that it is entitled to indemnity from Haenn (contractor) and therefore that the Supreme Court opinion in Halcyon does not control. As we have above indicated that argument finds no support in the present situation where upon the facts proven the jury properly found that the charterer and the employer jointly caused the injury to Hawn."

See also: *Lo Bue* vs. *United States*, (CCA 2) 188 F. 2d 800; *Torres* vs. *The Kastor* (CCA 2) 227 F 2d 664; *Amerocean S. S. Co.* vs. *Copp*, (CCA 9) 245 F. 2d 291.

In *Union Stock Yards Co.* vs. *Chicago, etc. R. Co.*, 196 U. S. 217, it was pointed out that where several wrongdoers are involved, indemnity has been permitted to one against another, only where:

> "* * * the wrongful act of the one held finally liable *created* the unsafe or dangerous condition from which the injury resulted. * * * and the other has been held liable to third persons for failing to discover or correct the defect *caused* by the positive act of the other." (Italics ours)

In *American Mutual Liability Ins. Co.* vs. *Matthews*, supra, where a stevedore's employee was injured by the breaking of a guy rope on a winch, and the owner unsuccessfully sought indemnity from the contractor-employer, the Court said:

> "* * * In the case at bar no promise by the employer can be implied that he will not use equipment furnished him by the shipowner to be used for the very purpose to which it was put. *Nor can a promise be implied that he will use care to detect any defect in the equipment which patently existed when the equipment was delivered for use by the employer. To imply such a promise would mean that the employer agreed to protect the shipowner against liability arising out of the shipowner's own negligence. In the absence of an express promise, such an implication would be utterly unreasonable.* * *" (Italics ours).

If it be held that Petitioner is entitled to recover from Carbide in this case, its negligence, which gives rise to such right of recovery, precludes the implication of any contract on the part of Amherst to indemnify Carbide for

---

For other illustrations of this principle, see: *Washington Gaslight Co.* vs. *District of Columbia*, 161 U. S. 316; *Rich* vs. *U. S.*, (CCA 2) 177 F. 2d 688; *Standard Oil* vs. *Robbins Dry Dock Co.*, (CCA 2) 32 F. 2d 182; and *Gray* vs. *Boston Gaslight Co.*, (Mass.) 19 Am. Rep. 324.

its liability. We submit that the decisions hereinbefore referred to, show that a contract of indemnity will be implied only where the owner of a vessel is made liable solely because of a hazard *created* by the contractor, without any actual fault of his own. This is not, and, under the West Virginia Wrongful Death Act, can not be, such a case.

VII.

Conclusion

For the foregoing reasons it is submitted that the judgment of the Court of Appeals should be affirmed; and that, in any event, Carbide is not entitled to recover indemnity from Amherst.

Respectfully submitted,
HOMER A. HOLT,
WILLIAM T. O'FARRELL,
DAVID D. JOHNSON,
Counsel for Respondent,
Amherst Barge Company.

JACKSON, KELLY, HOLT & O'FARRELL,
Of Counsel
1601 Kanawha Valley Bldg.,
Charleston, W. Va.
October, 1959.